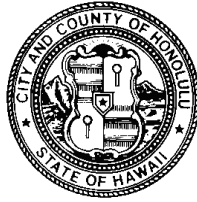


ETHICS COMMISSION  
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL  
MAYOR



CHARLES W. TOTTO  
EXECUTIVE DIRECTOR &  
LEGAL COUNSEL

ETHICS COMMISSION  
CITY AND COUNTY OF HONOLULU

Date and Place: November 21, 2014  
Standard Financial Plaza  
Conference Room, Suite 211

Present: Charles W. Gall, Esq., Chair  
Katy Chen, Esq., Vice Chair  
Michael A. Lilly, Esq., Commissioner  
Stephen Silva, Commissioner  
Jeffrey Burroughs, Ph.D., Commissioner  
Stanford Yuen, Commissioner  
Hon. Riki Amano (ret.), Commissioner  
Charles W. Totto, Executive Director and Legal Counsel (EDLC)  
Laurie A. Wong, Associate Legal Counsel (ALC)  
Letha A.S. DeCaires, Investigator  
Geoffrey Kam, Deputy Corporation Counsel, Department of the  
Corporation Counsel (COR)

Stenographer: Lisa P. Parker, Legal Clerk III

**I. CALL TO ORDER**

The 484th meeting of the Ethics Commission ("Commission" or "EC") was called to order at approximately 11:40 a.m. by Chair Gall.

The Commission had before it the EDLC's memorandum regarding the Agenda Items for the November 21, 2014 Meeting, Open Session, dated November 14, 2014.

**II. FOR ACTION: REQUEST FOR A MOTION TO APPROVE THE MINUTES OF THE OPEN SESSION OF THE OCTOBER 27, 2014 MEETING**

**Commissioner Silva moved that the Minutes be accepted. Commissioner Yuen seconded the motion. The Commissioners voted unanimously to approve the Minutes.**

### III. OLD BUSINESS

The Commissioners agreed that the next meeting date would occur on Tuesday, December 16, 2014. The Commissioners further confirmed tentative meeting dates for the following: Wednesday, January 21, 2015; Wednesday, February 18, 2015; and Wednesday, March 18, 2015; all at 11:30 am.

### IV. NEW BUSINESS

#### A. For Discussion: Administrative News.

1. Complaints and requests for advice statistics through last month. The ALC referred to the Open Session memo dated November 14, 2014 and noted that she had added a new column to show the change from the prior month.

2. Website Statistics. The ALC referred to the Open Session memo dated November 14, 2014.

3. Status of Corporation Counsel Legal Opinions to Ethics Commission Regarding COR's Budget Authority. The ALC explained that staff had just received COR's legal opinion in regard to this matter the morning of the meeting. Commissioners were provided copies of the opinion for their review. The ALC stated that a discussion of the opinion would be placed on the agenda for the next meeting. Chair Gall asked the EDLC whether he should recuse himself from this matter. The EDLC stated that he would have to get back to him, but for now, the EDLC confirmed that he should recuse himself. Chair Gall returned the COR opinion without viewing it.

4. Status of Filling the Legal Clerk I Position; Reallocating the Investigator II to an Investigator IV, and Creating and Filling an Assistant EDLC Position. The ALC explained that the EDLC had extended an offer for Legal Clerk I to Kristine Bigornia and that she accepted the offer and is being processed by Cathy Maki, Administrative Services Officer, COR.

5. Status of Strategic and/or Operating Plan for Fiscal Years 2016-2019. The ALC stated that in response to a request from the Commissioners to review the Strategic/Operating Plan, she had attached a working draft to the Open Session Memo. She stated that staff was waiting to use the survey results in order to update the Plan, but due to a Union complaint alleging that the Commission needed to meet and consult with them, all work on the survey has stopped. The ALC stated that she sent a request for legal advice to COR asking about the Commission's obligations to meet and consult with the Union about the survey under the statute cited by the Union. The ALC stated that based on her preliminary reading of the cited statute, it did not appear that the Commission was required to consult with the Union because the Commission was not implementing any new policy that would change personnel relations. Commissioner Silva added that he believed that the survey was to set forth our goals.

Vice Chair Chen asked when the last survey had been conducted. The EDLC stated that from 2004-2010 the Commission had administered thousands of surveys to managers and supervisors at the training sessions who were union members, both UPW and HGEA. No-one had ever complained about it. Vice Chair Chen asked if the current survey questions were similar to the ones in the past. The EDLC responded that they were similar and simpler.

The EDLC stated that he reviewed the HGEA collective bargaining agreement, and it stated that a meet and consult is required if the employer is implementing any major policy change affecting employer employee relations. EDLC stated that's not what we are looking for. ALC confirmed they received 1500 surveys. Vice Chair Chen asked what the status of the survey is now. The ALC stated that she was instructed not to use or publish the survey results until this issue with the union is resolved.

Vice Chair Chen asked if the purpose of the survey was sent out at the same time as the survey. The ALC confirmed that it was and explained the process that was used to distribute the survey, with an email that explained its purpose.

Commissioner Amano asked what was the survey needed for. Commissioner Silva responded that it was to set goals for the future. The ALC agreed that she wanted to find out, what do people in the City think about the Commission, how can the Commission improve, and what was the ethical temperature/culture of the City.

Commissioner Amano asked if staff had a draft plan for FY16? The ALC stated that the working draft plan was provided in OPEN-1. She further stated that the plan is a working document and that a lot of things changed since the document was drafted. For instance, the Commission had initially set goals to establish anti-retaliation legislation and to create an anti-retaliation page on the Commission's website. But, after reviewing the survey results, we determined that the reason that people do not report ethics violations is not because they are afraid of retaliation, it is because they think nothing will happen if they report it, or they do not know where to report it to. Therefore, the feedback from the survey allows the Commission to set or change priorities. The ALC wanted to update the operating plan based on the survey.

Commissioner Amano asked if it is for the future operating plan. The EDLC and ALC stated it was for a FY 16-19 plan. Commissioner Amano stated that we have to pick and choose our battles – everyone is attacking us. She stated that she was not afraid of fighting, but the Commission has a small staff, and a discrete job to do, so the Commission just needs to do its job. She stated that she feels like we should back off; that the survey is not that big a deal; and since we are not into 2016, we have time to methodically review our existing plan, to determine how important was the survey. If the Commission feels that the survey is important, then we meet with the Department of Human Resources and the Unions to see if they have objections. The EDLC stated that it is exactly what they want us to do. He further stated that it is not a fight; staff is asking COR for an opinion. Commissioner Amano stated that she was referring to the union letter. The EDLC confirmed his understanding and reiterated that there is no big brewing battle. We are asking for a legal opinion if we have a legal duty. The EDLC stated that no one has ever brought this up in the past. Chair Gall stated that, at this point, we have sent out a request for legal advice.

Commissioner Amano continued stating that she does not think the the mini-battles for no reasons were worthwhile. She stated that she is here to do the work of the Commission. The EDLC stated that the best practices for ethics programs are to obtain survey results from constituents. He continued that this survey is just a small part of what staff is doing. Commissioner Amano replied that she knows that this is not what staff is doing and that was her concern.

6. Board and Commission Member Mandatory Ethics Training New Dates: December 11 and 15, 2014. The ALC confirmed the training dates, and let them know there is a maximum of 50 people that can fit in the Mayor's Conference Room. The ALC also offered a specialized training for the Commissioners that would have more specific hypotheticals. Chair Gall stated that the specialized training would be appropriate for the Commissioners since they are in a specialized position. Commissioner Burroughs mentioned that since there are new commissioners coming on board, that perhaps the special training should be scheduled in January. Commissioner Amano stated that she preferred to attend the public training. Chair Gall asked if he had an obligation to attend even if he is leaving the Commission? The EDLC confirmed – No.

Vice Chair Chen asked if there would be an issue if some Commissioners attended the public training instead of the specific training for the Commissioners. The EDLC stated that we will cover the same general materials, but there will be specialized hypotheticals for the specific training. Vice Chair Chen asked if it would be problematic if the EDLC talks about specific issues to Commissioners only at the special training, and the Commissioners that don't attend the special training wouldn't know about it. Commissioner Amano stated that she will attend both training sessions and that she wanted to see what is provided in the public training session, she stated that she is new and will attend any training.

B. For Discussion: Should the Commission Adopt a Formal Policy for News Releases?

Commissioner Amano stated that she wanted the Commission to consider this issue and although she didn't attend the prior meetings, she appreciated the deference that the issue is on the agenda now. She stated that the issue arose during the Cachola case. She stated that there was a news release that went out over the weekend and she was surprised; it didn't feel good because the EC was supposed to know about it prior to the release. After that occurred, she asked the EDLC if there was a policy in place. She stated that in other places that she has worked they have an adopted policy so there is consistency.

Chair Gall stated that it is a good point, and it has been discussed before but he couldn't recall if any policy had been adopted. The EDLC stated that this issue was previously discussed when there was a news release in regard to the Commission's budget. The concern was that the news release sounded like it was coming from the Commission instead of staff. Commissioner Amano asked if there was a distinction between the Commission and the staff. The EDLC stated that he didn't know – he stated that as staff, he couldn't say there was any ethics violations, only the Commission can. The EDLC explained that the Managing Director thought we were airing

dirty laundry in public, but we had given her a copy of the news release and asked her for comments. Chair Gall stated that he thinks that situation underscores the need for a policy.

Commissioner Amano stated that she thought the Commission as a whole should talk about it – what should be in a release, and what should not. The Commission should be the vehicle that decides that. The EDLC stated that the Commission should decide the policy, but not the content of the news release. He stated that if we had to wait for Commission approval for content of the news release, it would make it ineffective because we have to wait thirty days. Commissioner Lilly stated that if you have something that is pressing and needs to be released, you can't have it on an agenda and wait thirty days for approval. But, there is value to sending it to the Commissioners prior to release.

The EDLC apologized to the Commission in regard to the news release for the Cachola case. He stated that the Commission put a ten-day embargo on disclosing the Commission's opinion unless Mr. Cachola disclosed it first. The EDLC continued, prior to the ten-day embargo concluding, Mr. Cachola contacted the media over the weekend. Based on his experience with the media, he was worried that Mr. Cachola's viewpoint would be repeated by other media sources without the Commission's position being reported on. He explained that on Saturday morning, he asked the Legal Clerk to come in and assist him with distribution. He stated that he made the mistake of sending out the news release to the media, but forgot to copy the Commissioners.

Commissioner Amano clarified that the Commission should not be telling staff the content of the news release. She stated that instead, the EC should look at the broad policy, such as the kinds of things that should be released, when, and to whom. Commissioner Amano asked why there was a news release for the Cachola Advisory Opinion as the elaborate opinion should have spoken for itself. The EDLC responded that the media does not read the advisory opinion because they have a fast turn-around. Commissioner Amano then asked why should the EC issue an elaborate advisory opinion if the media is not going to read it. She stated that instead of a news release, the Commission could draft a summary sheet and provide it to the media. The EDLC stated that the news release was a summary. Commissioner Amano disagreed. She stated that the news release is not a summary; it lends itself to the public battles. She stated, "that is not where we do our battles; the documents and records speak for themselves." She continued stating that the prosecutor and defense counsel make their comments on TV, but you do not see the judges making comments on TV even though they are the ones making the decisions.

Vice Chair Chen asked her why she describes a news release as a public battle. Commissioner Amano stated that the Commission has an elaborate opinion and we provide an embargo so the subject can have the chance to prepare for the release. The EDLC stated that if the other side does issue a news release first, then the EC also needs to be able to inform the public of the EC's side as well. Commissioner Amano stated, "that is why the Commission issues the advisory opinion." The EDLC responded that realistically, people are not going to know how to find the opinion on our website; also, it is difficult to get the media to read it. Commissioner Amano stated, "that is what she is referring to – in that people are not reading the opinion, so we are taking the battle to the public so they have their opinion, and then we have to summarize our own written opinion and put it out there too."

Commissioner Silva stated that we are educating the public as to what has transpired – to raise awareness so other people avoid getting into that same situation. He continued that it's an educational tool for everyone concerned.

Commissioner Amano stated that the Commission issues a decision, the decision is public, and that is what we do. Commissioner Silva stated that members of the public do not go down to the courthouse to read all the decisions. Commissioner Lilly stated that the EDLC is like the prosecutor. The EDLC gets the settlement; so when he issues the press release, he summarizes it so that everyone can understand it. He's doing it as an advocate.

Commissioner Amano asked again - when does the staff and Commission separate? She continued, if the EDLC is issuing the news release, he is doing it on behalf of the Commission as well, which is why we should have a PR release policy. She stated that Keith Kaneshiro does not talk for the courts.

The EDLC stated that there is a big difference between an agency and the courts. If a settlement comes into a court, the court would not issue a news release, even if it is newsworthy because it is inappropriate; also, neither of the parties have a duty to inform the public. But the Commission does have a duty. Because the judiciary is so important, it is singularly reviewed. The judiciary is a newsmaker in and of itself. The EDLC further stated that the point of the Commission is to inform people of all spectrums as required in the open records law. It is to show what the Commission is doing, and what public officers and employees are doing whether right or wrong; that is why we need to get the information out.

Commissioner Amano asked what is the status of our investigation in regard to the other councilmembers. The EDLC responded that he would talk about it during executive session. Commissioner Amano further stated that those complaints came up through that whole media discussion. The EDLC responded that it was Mr. Cachola who brought forth the complaints against the other councilmembers. Commissioner Amano stated that Mr. Cachola brought it up, but the EDLC responded to the complaint. The EDLC explained that our policy says that we can respond if someone makes a complaint to the media; and he responded by saying that we will investigate it.

Commissioner Amano further stated that she has made herself clear and this is not the way she likes business to be done. She stated that the EC doesn't fight battles in the public or with the media, and also stated that she agreed with the education piece – which she felt could be accomplished through training. She further stated that maybe there should be a policy that every time the EC issues an advisory opinion the EC needs to issue a summary sheet and a news release regardless of the embargo. She stated that she understands the purposes, but doesn't like the methodology. She further stated that she is not big into fighting in front of the media as nothing gets done there.

**Chair Gall made a motion that the EDLC draft a proposed news release policy and to put it on the agenda for the Commission's discussion, adoption, and approval next month. Commissioner Amano seconded the motion. The motion passed unanimously.**

C. For Discussion: Ethics Commission Staff Duties During a Contested Case Hearing.

The ALC stated that during the Cachola case, there was some confusion in regard to the filing and distribution of pleadings. Commissioner Amano stated that what was more problematic was determining where documents get filed and retained. Chair Gall stated that since we are a hybrid office, this is a difficult situation. The ALC stated that she had some discussion about a practice to follow with Mr. Kam. In cases where Mr. Kam is counsel and staff is prosecutor, perhaps COR could handle the intake and custody of the documents. Commissioner Amano stated that it was her understanding that this request was made and rejected during the case. Mr. Kam stated that it is one thing for Mr. Kam to have access to the documents; but it is another matter for COR to handle all the intake for the Commission's documents. Mr. Kam stated that he will not accept on behalf of COR to do that. He further stated that it is common for other agencies to have hybrid duties. For example, the Office of Disciplinary Counsel ("ODC") has to prosecute and at the same time intake documents.

Commissioner Amano asked if the ODC has a much larger staff than the EC. Mr. Kam stated that it is approximately double. Commissioner Amano stated that the Commission's small staff precludes us from doing what ODC does. Mr. Kam stated that if the EC wants COR to serve in an administrative capacity in regard to formal proceedings for contested case hearings, that is something to discuss with Ms. Leong.

Chair Gall asked about the ODC's procedures in regard to the hybrid functions. Mr. Kam stated that when the ODC conducts a formal proceeding, documents are filed with the Board. There is a deputy assigned, and staff keeps the board's file. Also, the prosecutor has her own set of files and it all exists in the same office. Mr. Kam further stated that they operate with the same constraints. Mr. Kam also stated that some disciplinary counsel jurisdictions actually have specific counsel assigned to the board and a prosecutorial staff. The EDLC stated that the same exists for the ethics jurisdiction but it is for much larger commissions. Mr. Kam stated that the Commission is the official custodian of the files anyway.

Commissioner Amano stated that the EC staff performing hybrid duties is not practical. The EDLC explained that the ALC had set a practice during the Cachola case where the non-lead attorney directs the clerk in regard to filing and distribution of documents. Commissioner Amano stated that it is not ideal, and we are lucky that the case settled. She further stated that it is not possible to administer cases with the EC's small staff short of assigning the contested case out. She stated that it is the appearance of impropriety that bothers her. She asked about the frequency of contested cases?

The EDLC stated that this was the largest case, but there is about one per year. The ALC stated that in the prior case, they used a hearing officer. The originals were filed with the Commission and were then given to the hearing officer for custody. Commissioner Amano suggested finding out more about this split of duties from the ODC and volunteered to obtain more information.

The EDLC stated that staff would find out more from the ODC. Chair Gall stated that we don't need anything formal, and that the EDLC will look into this and then report back.

The ALC asked if there were any other offices that have this strange hybrid. The EDLC responded, the Hawaii State Ethics Commission. Commissioner Amano asked if the Liquor Commission is in the same situation. Mr. Kam and the EDLC stated that they were not, since they have a staff of 40 and an assigned COR deputy to advise.

Commissioner Amano stated that the Ethics Commission staff is so small it is mind boggling. She further stated that it may come down to adopting a policy that we don't prosecute our own cases and that we hire out or hire hearing officers, which also has to be built into the budget.

Commissioner Silva suggested sending the cases over to the Department of the Prosecuting Attorney ("PAT"). The EDLC responded that PAT is used to dealing with criminal laws and there is a different standard of proof. Commissioner Amano stated that PAT handles the Department of Land and Natural Resources ("DLNR") cases which are violations. The EDLC stated that there are some jurisdictions that have criminalized all ethics law violations.

Commissioner Amano stated that unless the county will commit to doubling the Commission's resources, she doesn't see how we can continue with everything we do: training, adjudicating, prosecuting.

Commissioner Silva remarked that we are creating more work here, and that he believes in keeping it simple. Chair Gall replied that sometimes keeping things simple takes the most work.

Chair Gall stated that it appears that the first part of the memo had been discussed. He asked the ALC to go over the next issue. The ALC asked if the Commissioners wanted to enter into Executive Session, since the rest of the discussion would involve staff providing the EC with legal advice as to the powers and duties of the Commission.

**Commissioner Lilly made a motion to enter into Executive Session and that Section C of the Open Session Memo be put in with the executive session memo. All were in favor.**

At this time, Mr. Kam got up to leave the room. The EDLC explained that according to the OIP, if Mr. Kam unnecessarily remained in the room, it could be a waiver of attorney-client privilege. Mr. Kam offered that, after discussion, if any Commissioners wanted to talk to him, they could. Mr. Kam left the room.

*[The following is a summary of the executive session discussion of Agenda item IV.C.]*

After discussion, **Chair Gall made a motion for staff to prepare an analysis on the ability and practicality of the Commission to split the probable cause and adjudicative functions for the next meeting. Commissioner Lilly seconded the motion. The motion passed unanimously.**

## **V. EXECUTIVE SESSION SUMMARY**

Per the Commission's earlier request, the EDLC provided an update on the investigations of the other councilmembers.

- A. For Action: Request for a Motion to Approve and Adopt the Minutes of the Executive Session of the September 17 and October 27, 2014 Meetings.  
(HRS Secs. 92-5(a)(2), (a)(4) and (a)(8))

**Commissioner Burroughs moved to approve the minutes. Commissioner Silva seconded the motion. The motion passed unanimously.**

- B. For Action: Request for a Motion to Approve and Adopt a Formal Advisory Opinion in regard to a City Officer Who has a Personal Conflict of Interest. (HRS Secs. 92-5(a)(2), (a)(4) and (a)(8))

**After a brief discussion and recusals, Commissioner Lilly moved to approve the opinion and the redacted opinions. Commissioner Yuen seconded the Motion. The motion passed unanimously.**

## **VI. ADJOURNMENT**

**Commissioner Lilly moved to exit Executive Session and adjourn the meeting. Commissioner Burroughs seconded the motion. The motion passed unanimously.**

The meeting adjourned at approximately 1:30 p.m.